Filed 1/8/13 P. v. Turner CA2/2

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. SEAN THOMAS TURNER, Defendant and Appellant.	B236483 (Los Angeles County Super. Ct. No. YA077615)

APPEAL from a judgment of the Superior Court of Los Angeles County. Victor L. Wright, Judge. Affirmed with modifications.

Law Offices of James Koester and James Koester for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Victoria B. Wilson and Noah P. Hill, Deputy Attorneys General, for Plaintiff and Respondent.

* * * * * *

A jury convicted appellant Sean Thomas Turner of infliction of corporal injury on a spouse (Pen. Code, § 273.5, subd. (a), count 1)[1] and assault by means likely to produce great bodily injury (§ 245, subd. (a)(1), count 2). Appellant admitted that he suffered a prior conviction for spousal abuse within the meaning of section 243, subdivision (e)(1). The trial court imposed concurrent mid-term sentences of three years in state prison on counts 1 and 2. The trial court suspended execution of sentence and placed appellant on formal probation for four years on terms and conditions of probation, including that he serve 222 days in county jail. Appellant was awarded 222 days of presentence credit consisting of 148 days of actual custody credit and 74 days of conduct credit.

Appellant contends the trial court erred (1) by failing to instruct the jury sua sponte on misdemeanor spousal battery (§ 243, subd. (e)) as a lesser included offense in count 1; (2) by failing to instruct the jury sua sponte on misdemeanor assault (§ 240) as a lesser included offense in count 2; (3) by instructing the jury with CALCRIM No. 852, which allowed the jury to consider evidence of uncharged acts of domestic violence; and (4) in calculating appellant's presentence credit.

We order the abstract of judgment modified to reflect 296 days of presentence custody credit. In all other respects, the judgment is affirmed.

FACTS

Prosecution Evidence

A. Incident on March 17, 2010—Counts 1 and 2

On March 17, 2010, at approximately 7:57 p.m. Torrance Police Detective Jesus Garcia and his partner Officer Wells responded to a domestic violence call. The victim, Christina Turner,[2] approached the officers and told them that appellant had choked her with his hands. Christina was crying and "very upset." Christina and appellant had

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[1] All further statutory references are to the Penal Code unless otherwise stated.

[2] We refer to family members with the same surname by their first names for ease of reference, and intend no disrespect.

known each other for about 20 years, were married for 10 years, and had two children together. Appellant was inside the residence with their two children. She told Detective Garcia that there had been prior incidents in their relationship and appellant had been arrested in 2003 for domestic violence.

Detective Garcia asked appellant to step outside the house and remain with Officer Wells while he conducted a protective sweep of the Turner residence. Detective Garcia searched the residence room by room. He also checked the backyard and determined that only the couple's two minor children were present. He brought Christina into the residence where he tried to calm her down and interview her while appellant remained outside with Officer Wells.

Christina told Detective Garcia that appellant had been calling her and "e-mailing her constantly throughout the day requesting that she transfer $4,000 into his bank account." She showed Detective Garcia the e-mails on her cell phone. Christina did not give appellant the money because he had a gambling problem. Appellant argued with Christina when he got home over their financial problems in general and her refusal to transfer the $4,000. Appellant was also upset with Christina because she had voted for President Obama. Appellant threw a bottle of water at Christina which missed her and spilled on the floor. He also threw a soft cushioned chair but it did not hurt her.

Christina told Detective Garcia that she walked towards the front door of the residence because she no longer wanted to argue with appellant. She was carrying their 14-month-old baby in her arms at the time. Appellant followed her to the door and "pushed her up against the wall and proceeded to choke her with his hand around her neck" while she was holding the baby. Appellant then took the baby from Christina and used his elbow and forearm to pin her against the wall. Christina managed to escape and ran to her next-door neighbor's house from where she called 9-1-1.

Joel Moreno lived next door to the Turner residence and was at home on the night of March 17, 2010. Christina came to his house and asked to use the telephone. Christina was "red and crying" and "looked like she was troubled, like something was really wrong."

Christina was coughing during the 9-1-1 call and told the dispatcher that appellant had hurt her and was in the house with their children. She said that appellant had his hand around her neck and choked her. In response to the 9-1-1 operator's questions regarding how the argument started, Christina responded, "He called me a fucking nigger lover because I voted for Obama. He's such a freak. There's something wrong with him." When the operator asked if appellant would hurt the children, Christina responded, "I don't know. He's hurt me."[3]

Officer Wells photographed redness and markings on Christina's neck which she said were caused by appellant choking her earlier that evening.[4] Christina told Detective Garcia that she wanted to divorce appellant and that she wanted him to be prosecuted for choking her. She also signed a form requesting an emergency protective order which was served on appellant later that same night.

The following day, Torrance Police Detective Fareed Ahmad interviewed Christina by telephone. Christina told Detective Ahmad that she and appellant had argued over the fact that she had voted for President Obama, that appellant grabbed her by the neck and pinned her against the wall, and that he did it to prevent her from calling the police. She complained of soreness and pain in the neck area.

One week after the incident, Christina filed an application for a restraining order against appellant. Christina also filed for divorce as a result of the incident because she said she "thought things through" and wanted to get out because "it was not healthy." Approximately one month after the incident and the day before appellant's arraignment in this case, Christina and appellant entered into a stipulation in the divorce proceedings which provided that Christina "shall not press charges against or in any other way

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[3] A transcript of the 9-1-1 call (People's exhibit 4B) was not part of the record on appeal. An audio recording of the 9-1-1 call containing this statement was admitted into evidence during appellant's defense case (People's exhibit 4C). A redacted audio recording of the 9-1-1 call was played for the jury and admitted into evidence during the prosecution's case (People's exhibit 4A).

[4] The jury was shown the photographs of Christina's neck taken by Officer Wells.

facilitate or cooperate with the prosecution of [appellant] . . . with regard to the incident on March 17, 2010, and the resulting criminal case." Christina further agreed to "make a good faith effort to encourage the prosecutor to not continue with the prosecution of [appellant] with regard to said incident in criminal matters." Christina also went to the district attorney's office to tell the prosecutor that she did not want appellant charged.

B. Incident on April 11, 2004—Prior Act of Domestic Violence

On April 11, 2004, at approximately 9:25 a.m., Los Angeles County Deputy Sheriff Johnny Quick and his partner Deputy Quan Chow responded to a domestic violence call at appellant's residence in Rancho Palos Verdes. Deputy Quick was speaking to appellant when Christina came running across the street. She was crying and yelling "He hit me." Christina told Deputy Quick that appellant had a gambling addiction and wanted credit cards that were in her name along with the personal identification numbers to access the accounts. Christina refused and an argument ensued. When Christina said she was going to call the police appellant grabbed the telephone and "slammed his forearm and his elbow in an upward motion into her chest." Appellant threw two cordless telephones in Christina's direction as she ran from the house. Christina ran to a neighbor's house from where she called 9-1-1.

Deputy Quick saw that Christina had injuries to her nose and chin and she complained of pain in her chest from appellant's elbow. Christina told Deputy Quick that she and appellant had also argued the previous day because appellant had pawned household items to pay for his gambling. Appellant struck Christina with his forearm and elbow and also grabbed her throat and shook her. Deputy Quick observed bruises that were consistent with injuries inflicted prior to the current incident. Neither appellant nor Christina were under the influence of alcohol.

The following day, Los Angeles County Sheriff's Detective Jennifer Williams went to Christina's home to interview her regarding the incident. Christina told Detective Williams that appellant had pawned numerous items including his wedding ring to pay his gambling losses, and provided Detective Williams with a copy of the pawn slips. Detective Williams observed several bruises on Christina's arms and on her left shoulder.

Christina told Detective Williams that appellant had thrown a remote control that struck her in the arm, and shook her and threw her up against a wall. Christina said that appellant had struck her in the past and she called the police on three prior occasions because of appellant's behavior.

C. Christina's Trial Testimony

At the time of appellant's trial Christina and appellant were living together and she testified that she loved him. She testified that appellant never touched her on the night of March 17, 2010, and that she had "never ever been hit or hurt by a man."

Christina testified that she and appellant argued over their personal finances and the state of the economy. Christina was holding the baby, who had her arms wrapped around Christina's neck. Christina decided to leave for a walk or a drive to cool down because of the argument. Appellant did not want Christina to take the baby outside and grabbed her from Christina's arms. The baby scratched Christina as appellant grabbed her and pulled her away from Christina. Christina also testified that she gets blotchy and red when she is upset.

Christina claimed that she lied on the 9-1-1 call because she was angry with how appellant mishandled the finances and she wanted him out of the house. She lied to Detective Garcia when she told him that appellant choked her and slammed her against the wall because she was "angry" and "vindictive" and would say anything in order to get the police to "take [appellant] away." But, she insisted that on the night of the incident she told Detective Garcia and Officer Wells that the baby caused the scratches and redness on her neck. Christina explained that she was referring to appellant's poor decisionmaking involving business investments when she said he had a gambling problem. Christina did not ask for a protective order on the night of the incident and told the police officers that she did not want to press charges against appellant.

Christina testified that she remembered speaking with Detective Ahmad by telephone the day after the incident. She told him that the argument was about their finances and not about President Obama. She did not tell Detective Ahmad that appellant

choked her or pinned her against the wall. She told him that the injuries to her neck occurred when appellant took her daughter from her.

Christina acknowledged that she applied for a restraining order but did not remember what reasons she listed on the application form for wanting it, but insisted that it was only obtained to keep appellant out of the house. She filed for divorce not because appellant choked her but because they had been arguing for a couple of months and the latest incident was the "last straw." Christina testified that a mediator prepared the stipulation for the divorce proceedings. She signed it because she wanted the divorce to take place and not to help appellant avoid prosecution on the current charges.

With respect to the 2004 incident, Christina testified that she and appellant had both been drinking and got into an argument. Appellant first dared her to call the police and then threw the telephone to the ground when it appeared she was going to do so. Christina did not remember what the argument was about on that particular day but they usually argued about finances. She did not remember what she told the police officers at that time but she was certain that appellant did not strike her. She denied ever meeting or talking with Detective Williams regarding the case.

D. Expert Testimony

Gail Pincus, the executive director of the Domestic Abuse Center in Van Nuys, testified as an expert on Battered Woman Syndrome (BWS). Pincus testified that BWS is a theory that explains the cycle of abuse in a relationship between a batterer and his victim. The batterer achieves his need for power and control of his partner and their children through criticism, emotional abuse, isolation, jealousy, economic control and abuse, coercion, threats, intimidation, and violence. Violence often begins with a push or a shove, grabbing, and slamming into walls. It escalates to punches, kicks, strangulation, and the use of weapons, culminating in murder.

Pincus explained that women suffering from BWS commonly recant their initial reports of abuse. In many cases the victims minimize the abuse, blame themselves for its occurrence, or deny the abuse occurred at the urging and brainwashing of the abuser. Battered women often deny that they were victims of violence to remain with their

abusers. They humanize their abuser and are concerned about the abuser's safety. The "Stockholm Syndrome" which occurs when a hostage begins to view her attacker as the good guy and as the one who is misunderstood, explains why the hostage would recant his or her story, deny some of the violence that occurred and try to protect the abuser.

Pincus made clear that her testimony was offered to educate the jury about BWS, and was not intended to prove whether domestic violence took place in a particular case. She did not read the police reports or speak with any of the individuals involved in the instant case, and she was unable to determine whether Christina suffered from BWS.

Defense Evidence

Appellant testified on his own behalf. On March 17, 2010, he and Christina argued about the mortgage payment. He told Christina that he did not have the funds to pay the mortgage payment and asked her to lend him the money for one day. Christina started "ranting" and "raving" and using profanity and was "out of her mind." The baby began to cry when the argument got loud and Christina picked her up and walked towards the front door of the house. Christina swore at him when he asked her where she was going. He approached Christina and attempted to pull the baby away from her. The baby's hands were around Christina's neck and she continued to hold on to her mother. He continued to pull the baby for two or three minutes until he was successful in getting her away from Christina. Christina ran out of the house and he took the baby back to the living room.

Detective Garcia and Officer Wells came to his house approximately 30 minutes after Christina left the house. Officer Wells handcuffed him and took him outside. He told Officer Wells that he did not know why Christina called the police and why he was being handcuffed. He also told Officer Wells that his mother Penny had been present at the house during the argument.[5]

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[5] Detective Ahmad had previously testified that the prosecution told him three weeks before the trial began that they had only then been informed that Penny was a witness to the incident. He left voicemail messages for Penny which were unreturned and interviewed her in the courthouse while the trial was in progress.

Appellant denied striking or grabbing Christina at any point during the argument. He denied trying to influence Christina's testimony or dissuade her from testifying, but he acknowledged signing a stipulation in which Christina agreed to withdraw restraining orders she had against him and not cooperate with the prosecution of charges arising out of the March 17, 2010 incident.

With respect to the 2004 incident, he testified that it was a "pretty crazy weekend." He and Christina had been drinking all weekend and were both very drunk when they argued. Christina dared him to throw a telephone at her and he did. The phone broke close to her but he did not think it hit her. He denied striking her with his hands or arms. When asked about the bruises on Christina's body observed by Detective Williams, appellant testified that he and Christina had engaged in "rough sex" that weekend. He was so drunk that weekend he did not remember meeting with Detective Williams. He did not remember telling Detective Williams that he had a gambling problem and argued with Christina about money, that he may have pushed Christina at some point during the argument, or that he "snapped" because he was under too much stress.

Appellant's mother, Penny Turner, testified that she was in the house on the evening of March 17, 2010 and witnessed the incident involving Christina and appellant. Appellant and Christina started arguing about finances as soon as they got home. She told appellant to get the baby when Christina started to walk towards the door holding the baby. She saw the baby's hands holding onto Christina's neck as appellant tried to take her from Christina. When Christina left the house, Penny went outside to look for her. She "walked a little ways" but did not see her and returned to the house. She stayed at the house for at least 15 minutes before leaving for the night. She never witnessed any physical contact between appellant and Christina and never heard appellant use any foul language.

DISCUSSION

I. Instructional Error Regarding Lesser Included Offenses

Appellant contends that the trial court violated its sua sponte duty to instruct the jury on the lesser included offenses for each count.

Standard of Review and Relevant Law

We review de novo whether the trial court erred in failing to instruct on a lesser included offense. (*People v. Cook* (2006) 39 Cal.4th 566, 596.)

"In a criminal case, a trial court must instruct on the general principles of law relevant to the issues raised by the evidence. [Citation.]" (*People v. Earp* (1999) 20 Cal.4th 826, 885.) "That obligation has been held to include giving instructions on lesser included offenses when the evidence raises a question as to whether all of the elements of the charged offense were present [citation], but not when there is no evidence that the offense was less than that charged. [Citations.]" (*People v. Breverman* (1998) 19 Cal.4th 142, 154.) Alternatively stated, an instruction on a lesser included offense is not required when the evidence is insufficient to support a conviction of that offense. (*People v. Hawkins* (1995) 10 Cal.4th 920, 954, overruled on other grounds in *People v. Blakeley* (2000) 23 Cal.4th 82, 89.) "It is error . . . to instruct on a lesser included offense when a defendant, if guilty at all, could only be guilty of the greater offense, i.e., when the evidence, even construed most favorably to the defendant, would not support a finding of guilt of the lesser included offense but would support a finding of guilt of the offense charged. [Citation.]" (*People v. Stewart* (2000) 77 Cal.App.4th 785, 795–796.)

"Any error in instructions on a lesser included offense in a noncapital case is subject to the [*People v.*] *Watson* [(1956) 46 Cal.2d 818, 836 (*Watson*)] standard of review requiring reversal only if it is reasonably probable that a result more favorable to the defendant would have been reached in the absence of such error. (*People v. Breverman, supra,* 19 Cal.4th at p. 165)" (*People v. Stewart, supra,* 77 Cal.App.4th at p. 796.)

A. Misdemeanor Spousal Battery as a Lesser Included Offense of Corporal Injury to a Spouse

Appellant contends that there was a plausible alternative to the prosecution's theory that appellant personally caused the injuries. He argues he was entitled to an instruction on misdemeanor battery. According to appellant, given the conflicting nature of the testimony regarding the incident, the jury might have believed that Christina's injuries were caused by the baby clinging to her neck rather than appellant striking her.

The jury found appellant guilty of felony spousal abuse under section 273.5, subdivision (a), which provides: "Any person who willfully inflicts upon a person who is his or her spouse, former spouse, cohabitant, former cohabitant, or the mother or father of his or her child, corporal injury resulting in a traumatic condition is guilty of a felony, and upon conviction thereof shall be punished by imprisonment in the state prison for two, three, or four years, or in a county jail for not more than one year, or by a fine of up to six thousand dollars ($6,000) or by both that fine and imprisonment."

The term "'traumatic condition'" means "a condition of the body, such as a wound or external or internal injury, including, but not limited to, injury as a result of strangulation or suffocation, *whether of a minor or serious nature*, caused by a physical force." (§ 273.5, subd. (c), italics added.)[6]

"Section 273.5 is violated when the defendant inflicts even 'minor' injury. Unlike other felonies, e.g., aggravated battery (§ 243, subd. (d)) which require serious or great bodily injury, 'the Legislature has clothed persons of the opposite sex in intimate relationships with greater protection by requiring less harm to be inflicted before the offense is committed.' [Citation.]" (*People v. Wilkins* (1993) 14 Cal.App.4th 761, 771.) Under the expansive reach of the statute, a traumatic condition can be established by bruising or redness. (*People v. Beasley* (2003) 105 Cal.App.4th 1078, 1085–1086 [bruising]; *People v. Wilkins, supra,* at p. 771 [redness about the face and nose].)

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[6] The trial court instructed the jury that "traumatic condition" means "a wound or other bodily injury, whether minor or serious, caused by the direct application of physical force."

Misdemeanor battery on a spouse under section 243, subdivision (e)(1), is a lesser included offense to felony spousal abuse under section 273.5, subdivision (a). (*People v. Hamlin* (2009) 170 Cal.App.4th 1412, 1457.) Section 243, subdivision (e)(1) provides: "When a battery is committed against a spouse, a person with whom the defendant is cohabiting, a person who is the parent of the defendant's child, former spouse, fiancé, or fiancée, or a person with whom the defendant currently has, or has previously had, a dating or engagement relationship, the battery is punishable by a fine not exceeding two thousand dollars ($2,000), or by imprisonment in a county jail for a period of not more than one year, or by both that fine and imprisonment." For purposes of this crime, a "battery" is defined as "any willful and unlawful use of force or violence upon the person of another." (§ 242.) Thus, felony spousal abuse requires a "traumatic condition," but misdemeanor battery on a spouse does not.

Appellant's contention fails because the duty to instruct the jury on lesser included offenses is not triggered "when there is no evidence that the offense was less than that charged." (*People v. Wickersham* (1982) 32 Cal.3d 307, 323–324, overruled on other grounds in *People v. Barton* (1995) 12 Cal.4th 186, 201.)

Here, the jury was faced with deciding between two conflicting scenarios. Detective Garcia testified that when he responded to the 9-1-1 call he found Christina crying and upset and she told him that appellant had pinned her against the wall and choked her with his hands. Detective Garcia saw redness and markings on Christina's neck and Officer Wells photographed the injuries. On the other hand, appellant presented evidence to support his defense theory that the "traumatic condition" was caused by the baby. Both appellant and his mother Penny testified that appellant never touched Christina. Christina also testified that appellant never touched her on the night of March 17, 2010. She testified that she did not tell the police officers that appellant assaulted her. She explained that she "get[s] red all over" and "blotchy" when upset, and her alleged injuries were part of a ruse to get appellant kicked out of the house.

The jury chose to accept Detective Garcia's version of events, supplemented by the photographs of Christina's injuries taken at the scene, and rejected Christina's

recantation of her earlier statements to Detective Garcia and appellant's defense theory. But neither scenario supported an instruction for misdemeanor battery. Either appellant hit and choked Christina, causing the injuries observed by Detective Garcia, or appellant did not touch Christina. Appellant concedes, as he must, that one of the statutory elements of spousal battery requires a willful or unlawful touching done in a harmful or offensive manner. (See CALCRIM No. 841; *People v. Myers* (1998) 61 Cal.App.4th 328, 335.) The state of the evidence did not support a finding that appellant was guilty of simple battery on Christina. (*People v. Wickersham, supra,* 32 Cal.3d at pp. 323–324.)

Appellant acknowledges that proof of a traumatic injury distinguishes the offenses but argues that a juror could have found "that the prosecution had not proven the traumatic injury element of the Section 273.5 offense beyond a reasonable doubt." We disagree. To do so, a juror would have had to ignore the testimony, the photographic evidence, and the broad statutory definition of "'traumatic condition.'" (§ 273.5, subd. (c); *People v. Wilkins*, *supra*, 14 Cal.4th at p. 771.)

We are satisfied the trial court did not err in not instructing the jury on misdemeanor battery of a spouse as a lesser included offense of inflicting corporal injury to a spouse.

B. Misdemeanor Assault as an Included Offense of Assault by Means Likely to Produce Great Bodily Injury

Appellant contends that the court should have instructed the jury, sua sponte, on misdemeanor assault as an included offense of assault by means likely to produce great bodily injury because of the "minor nature of any injuries that may have been inflicted, and the lack of any evidence as to the amount and character of the force of the assault."

Simple assault (§ 240) is a lesser included offense of assault by means of force likely to cause great bodily injury. (*People v. Rupert* (1971) 20 Cal.App.3d 961, 968.) The two offenses are distinguished by the degree of force used in their commission. An assault is "an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another." (§ 240; see also *People v. Williams* (2001) 26 Cal.4th 779, 784.) A violation of section 245, subdivision (a)(4), by contrast, requires an assault

committed by means of force "which is significant or substantial, not insignificant, trivial or moderate." (*People v. Armstrong* (1992) 8 Cal.App.4th 1060, 1066.)

Whether Christina in fact suffered any harm is immaterial as the focus of the inquiry is whether appellant's conduct was likely to produce great bodily injury. (*People v. McDaniel* (2008) 159 Cal.App.4th 736, 747–748.) Here, the trial court had a duty to instruct the jury on simple assault if there was substantial evidence that appellant used a degree of force that was "insignificant, trivial or moderate." But, as we have described, appellant choked Christina and pinned her to the wall by her neck and chest using his forearm and elbow. Christina had redness and markings on her neck and could be heard coughing on the 9-1-1 call moments after she said appellant had choked her. The following day she complained of soreness and pain in the neck area. This degree of force cannot be described as "insignificant, trivial or moderate." (*People v. Aguilar* (1997) 16 Cal.4th 1023, 1028.) The trial court had no sua sponte duty to instruct on the lesser included offense.

C. Harmless Error

In any event, assuming arguendo the trial court erred by not instructing the jury on the lesser included offenses in counts 1 and 2, we nevertheless conclude it is not reasonably probable appellant would have been convicted of the lesser offenses. The prosecution presented strong evidence showing appellant committed the offenses of corporal injury on a spouse (§ 273.5, subd. (a)) and assault by means likely to produce great bodily injury (§ 245, subd. (a)(1)). Had the trial court instructed on misdemeanor battery and misdemeanor assault, it is reasonably probable the jury would nevertheless have convicted him of the greater offenses. The jury was presented with two competing versions of what occurred, one implicating appellant and one exonerating him. The prior domestic violence evidence was highly probative in the evaluation of the credibility of the two competing versions of events, and the 16-minute deliberation of the jury before reaching a verdict likely reflected the strength of the prosecution's case. (*People v. Weaver* (2001) 26 Cal.4th 876, 973–974.) Thus, there was no reasonable probability of a different outcome. (*People v. Watson, supra,* 46 Cal.2d at p. 836.)

II. Use of CALCRIM No. 852 Did Not Violate Due Process

Appellant contends the trial court violated his due process rights by instructing the jury with CALCRIM No. 852, "Evidence of Uncharged Domestic Violence." Specifically, he objects to instructional language that permitted the jury to consider evidence of the uncharged domestic violence incident if proven by a preponderance of the evidence. He claims the instruction allowed the jury to find the ultimate fact "based upon foundational facts that were found under a less than beyond a reasonable doubt standard." We disagree.

CALCRIM No. 852 is similar to CALJIC No. 2.50.02, which also deals with the manner in which juries can consider evidence of uncharged acts. In *People v. Reliford* (2003) 29 Cal.4th 1007, 1016, the court rejected virtually the same challenges as raised here. Following *Reliford*, the Third District Court of Appeal in *People v. Reyes* (2008) 160 Cal.App.4th 246, 250–253, reached the same conclusions regarding CALCRIM No. 852. The court in *Reyes* specifically rejected the two contentions raised here. The same court again rejected these contentions in *People v. Johnson* (2008) 164 Cal.App.4th 731, 738–740.

Appellant argues his challenge is somehow different from that raised in *People v. Reliford*, *supra*, 29 Cal.4th 1007, although that opinion finds no due process violation in the similar language of the CALJIC instruction. Appellant contends the court in *Reliford* considered "only the internal mechanisms of the instruction itself and did not consider the question through a holistic examination of the inter-relationship of the prior crimes evidence instruction and the circumstantial evidence instructions." We disagree with appellant and conclude the issues he now raises have been rejected by both the Supreme Court and the Court of Appeal. We agree with the reasoning in *Reyes* and *Johnson* and, of course, we follow the directions of the Supreme Court. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

The trial court did not deny appellant his right to due process by instructing the jury with CALCRIM No. 852.

III. Award of Presentence Custody Credits

Appellant contends that he is entitled to an additional 74 days of presentence conduct credit pursuant to section 4019. The People concede this point and we agree.

Appellant's offense was committed on March 17, 2010. He was convicted on February 25, 2011, and he was sentenced on July 22, 2011, receiving 148 days of actual custody credit and 74 days of conduct credit, for a total of 222 days. These credits were calculated under an amended version of section 4019 not effective until September 28, 2010, after appellant committed the instant offenses. (Stats. 2010, ch. 426, § 2.) Appellant should have been sentenced under the version of section 4019 effective January 25, 2010, under which he was entitled to presentence conduct credits equal to the amount of actual custody credit. (Former § 4019, subds. (b), (c), (f).) The correct calculation would give appellant 148 days of actual custody credit and 148 days of conduct credit, for a total of 296 days.

DISPOSITION

The judgment is modified to reflect that appellant is awarded 296 days presentence credit consisting of 148 days actual custody credit and 148 days of conduct credit. The clerk of the superior court is ordered to prepare an amended abstract of judgment and to forward a certified copy to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, Acting P. J.

DOI TODD

We concur:

_____, J.

ASHMANN-GERST

_____, J.

CHAVEZ